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*Norma A. Bradshaw*

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TRANSCRIPT OF PROCEEDINGS

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

NOV 3 - 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN RE APPLICATIONS OF:

EZ COMMUNICATIONS, INC.

and

ALLEGHENY COMMUNICATIONS GROUP, INC.

MM DOCKET NO. 93-88

Pittsburgh, Pennsylvania

DATE OF HEARING: October 19, 1993

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FREE STATE REPORTING, INC.  
Court Reporting Depositions  
D.C. Area (301) 261-1902  
Balt. & Annap. (410) 974-0947

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
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MM DOCKET NO. 93-88

The above-entitled matter come on for hearing  
 pursuant to Notice before Judge Edward Luton, Administrative  
 Law Judge, at 2000 L Street, N.W., Washington, D.C., in  
 Courtroom No. 4, on Tuesday, October 19, 1993 at 1:00 p.m.

**APPEARANCES:**

On behalf of EZ Communications, Inc.:

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 RAY KRAUS, Esquire  
 Koteen & Naftalin  
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 Washington, D.C. 20036  
 (202) 467-5700

On behalf of Allegheny Communications Group, Inc.:

MORTON L. BERFIELD, Esquire  
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On Behalf of the Mass Media Bureau:

ROBERT A. ZAUNER, Esquire  
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## I N D E X

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Opening Statements By Judge Luton

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E X H I B I T SAlleghenyIdentifiedReceivedRejected

Exhibit 3&amp;4

143

EZ Communication

Exhibit 5 w/attachments

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Hearing began: 1:00 p.m.

Hearing Ended: 1:15 p.m.

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## P R O C E E D I N G S

JUDGE LUTON: I want to thank the parties for giving me the memoranda that I asked for. I've heard enough argument about the question before me so that I am now ready to rule. The parties have told me what they think. Now I'll tell them what I think. I've got something written down here. I think I'll just read it.

The Hearing Designation Order which was issued by the Chief, Audio Services Division is surely correct as far as it goes. That is, that Section 73.2080 prohibits discrimination in recruiting, hiring and promoting of employees. In this case the Designation Order only goes so far as to say that Allegheny has not demonstrated any discrimination in recruiting, hiring or promoting of employees by EZ.

I view the language and the structure of the Designation Order as not limiting the scope of Section 73.2080 that the Commission itself has stated that the rules should have. I begin with the Commission's explicit statement of what the rule is intended to cover. That statement is found in Amendment of Part 73 of the Commission's rules concerning equal employment opportunity in the broadcast, video and television rules, Citations 2 FCC Record 3967. There the Commission said, "The Commission's current rules set forth several requirements to insure that licensees of broadcast

1 stations afford equal opportunity in employment. Under these  
2 rules broadcast stations are prohibited from discriminating on  
3 the basis of race, color, religion, national origin or sex and  
4 are required to carry out a continuing program designed to  
5 foster equal opportunity in all aspects of their employment  
6 policy and practice." And in a footnote to that passage the  
7 Commission said, "The current broadcast EEO rules are set  
8 forth in Section 73.2080 of the Commission's rules."

9           The Review Board's determination in Atlantic City  
10 Community Broadcasting -- that's at 68 RR 2nd 1420, affirmed  
11 at 8 FCC Record 4520, a 1993 case. The affirmation was in  
12 '93, I believe -- is consistent with the broader view stated  
13 by the Commission with respect to the sweep of Section  
14 73.2080. In that case certain conduct, while it's judicially  
15 determined it constituted employment discrimination, that same  
16 conduct was viewed by the Review Board as a matter involving  
17 employment discrimination within the intendment of Section  
18 73.2080.

19           In the instant case it seems to me that the  
20 arbitrator's opinion indicates that the arbitrator found a  
21 form of employment discrimination. The arbitrator  
22 specifically found the grievance action of walking off the job  
23 was justifiable in the Atlantic City Community case. The  
24 Review Board has identified a kind of matter that comes within  
25 Section 73.2080, the termination of an employee for a certain

1 reaction to an uncivil work environment.

2           Given the Review Board's view in Atlantic City  
3 Community, the situation found by the arbitrator raises in my  
4 opinion a question about EZ's compliance with Section 73.2080,  
5 a question which under GAF Broadcasting Company, FCC 93-385  
6 released August 16, 1993, may be pertinent to EZ's claim to a  
7 renewal expectancy. The Designation Order made no assessment  
8 of the conduct in this context. I, therefore, do not believe  
9 that I'm precluded from making an assessment.

10           Allegheny's Exhibits 3 and 4 for identification are  
11 received in evidence. No discreet issue will be added. The  
12 matter on which Allegheny relies will be not relitigated here.  
13 For that posture of the case the parties are free to argue the  
14 impact, if any, the determined conduct should have on EZ's  
15 claim to renewal expectancy. That is my ruling. That's all I  
16 have. I will not argue the ruling. I will not defend it. I  
17 will not discuss it.

18   (The documents that were  
19   previously marked for  
20   identification as Allegheny  
21   Exhibits 3 and 4 were received  
22   into evidence.)

23           MR. KRAUS: Can we raise a question about the impact  
24 of the ruling on where we stand in terms of the schedule?

25           JUDGE LUTON: Sure.

1           MR. KRAUS: The arbitrator's decision as distinct,  
2 to some extent at least, from the District Court decision has  
3 some conclusions in it which the arbitrator felt it  
4 appropriate, vile and despicable and so forth language, that  
5 in his mind gave justification to the conduct that Liz  
6 Randolph engaged in, namely leaving her airshift.

7           The question I have in my mind is I don't see those  
8 statements by the arbitrator as findings to which we are  
9 estopped collaterally or bound in some fashion. I think  
10 they're the findings of one person which are, at least to put  
11 it mildly, highly dubious. But I would be interested in  
12 knowing, Your Honor, if in your judgment or in your view we  
13 should be prepared to address with other witnesses or new  
14 witnesses the issue of whether that kind of language, and  
15 we're talking only about language and we're talking about  
16 language on the air, in any instance should be construed as  
17 creating a hostile work environment of the type the  
18 Commission, as I understand your ruling, can properly consider  
19 in a renewal context.

20           JUDGE LUTON: I didn't hear anything about  
21 scheduling. In that formulation there I hear it as kind of a  
22 sub rosa request that EZ be permitted to litigate at least  
23 some aspects of the arbitrator's decision. I'm determined  
24 that that's not going to happen. I don't know how else to  
25 answer your question.

1 MR. KRAUS: Well, let me put it -- obviously I  
2 didn't make it very clear. The arbitrator has reached certain  
3 conclusions about the conduct in question.

4 JUDGE LUTON: I'm not going to try the arbitrator's  
5 conclusions.

6 MR. KRAUS: But are we bound by them?

7 JUDGE LUTON: The arbitrator has said what he said.  
8 Now, whether you're bound or not, I'm not quite sure I know  
9 what you mean by bound.

10 MR. KRAUS: Well, the arbitrator said that, for  
11 example -- I don't have his decision right in front of me.  
12 The arbitrator said in effect that the colleagues of Mrs.  
13 Randolph on the morning show had used vile and despicable  
14 language. He also --

15 JUDGE LUTON: I'll tell you what I'm going to do.  
16 I'm going to cut this off by leaving it to EZ to work out its  
17 own plan, and whatever you propose I'll deal with it at the  
18 time it's proposed and I'll rule then. Any other questions?

19 MR. MILLER: Your Honor, I don't have a question,  
20 but if we're through with this topic, at the admissions  
21 session we left some attachments to EZ Exhibit 5. Would this  
22 be a good time for me to offer those or would you rather we  
23 waited until the date of the hearing?

24 JUDGE LUTON: I didn't bring mine with me, but I've  
25 received them. I assume that the other parties have received



1 | them, as well. It wouldn't matter to me whether they're  
2 | offered and received now. I think they'll be received without  
3 | objection, won't they, or will they?

4 | UNIDENTIFIED SPEAKER: --

5 | JUDGE LUTON: On my part -- about them. No dispute  
6 | there. Anything --

7 | MR. ZAUNER: Yes, Your Honor. I may have some  
8 | dispute.

9 | JUDGE LUTON: All right. Then it will be  
10 | appropriate to wait then until we're --

11 | MR. ZAUNER: It might be handled -- it might be  
12 | handled very quickly. I'd just like to know the purpose for  
13 | which some of these attachments are being offered.

14 | JUDGE LUTON: All right. Go ahead and make a formal  
15 | offer. If I can rule now, I will. If I can't --

16 | MR. BERFIELD: Your Honor, I'll be happy to furnish  
17 | you my copy.

18 | JUDGE LUTON: Thank you.

19 | MR. MILLER: Your Honor, we had previously offered  
20 | and you had received in evidence WBZZ Exhibit No. 5. Certain  
21 | attachments were referenced in that exhibit which were not  
22 | supplied and, therefore, were neither identified nor offered.  
23 | The attachments consist of a total of 145 pages extending the  
24 | total length of EZ Exhibit 5 to 149 pages. The -- it consists  
25 | of the WBZZ monthly reports referenced in the exhibit, the

1 WBZZ quarterly Program Director audit, the WBZZ six month  
2 audit, certain attorney updates sent to the station, and the  
3 WBZZ annual audit with the General Manager's response. That's  
4 how I would identify them and I would offer them in evidence  
5 as attachments to WBZZ Exhibit No. 5.

6 JUDGE LUTON: All right. The attachments to Exhibit  
7 5, I understand that Allegheny has no objection.

8 MR. BERFIELD: No objection, Your Honor.

9 JUDGE LUTON: The Bureau may have some objections.

10 MR. ZAUNER: Yes, Your Honor. Exhibit No. 5  
11 consists of a large collection of documents. Some of them are  
12 quite varied. They go from what appears to be interoffice  
13 memos critical of various employees to reports to  
14 ascertainment forms to rating data to sales data, letters  
15 received by the station. Some of the -- some of these  
16 documents may be relevant and some of them may not be, and my  
17 concern is just to make sure for the record that the purpose  
18 that these are being offered is to demonstrate the supervision  
19 of Mr. Meyer over the station or is there some other reason  
20 that they're being offered besides that? And if they're being  
21 offered for that purpose, then I guess I would have no  
22 objection, but I presume they're not being offered for the  
23 truth of the matter as asserted therein. I'm wondering if --  
24 JUDGE LUTON: They just asked what the purpose of  
25 the offering is. This is something that was referenced in

1 connection with Exhibit 5? I can't recall now whether that  
2 came in without objection or not. I assume it did. Did it?

3 MR. MILLER: I believe so, Your Honor. The thrust  
4 of Exhibit 5 is that substantial efforts have been made over  
5 the years towards compliance with the Commission's rules and  
6 that this involves various levels of monitoring by personnel  
7 at the station, by the General Manager, by people at  
8 Headquarters. These attachments consist -- if I can go  
9 through them. We have the monthly reports that the station's  
10 General Manager makes to Headquarters. Most of the  
11 attachments to which Bureau counsel referred already need  
12 attachments to that. For example, there are some, some  
13 ascertainment reports. These were forwarded to Headquarters  
14 and they are not intended for the truth of the matter as  
15 contained therein, but simply to show that the various  
16 ascertainment reports were, in fact, forwarded to Headquarters  
17 with the monthly reports.

18 JUDGE LUTON: All right. To show a -- to show some  
19 oversight --

20 MR. MILLER: Exactly, Your Honor, and they are  
21 merely illustrative.

22 JUDGE LUTON: All right.

23 MR. ZAUNER: Under that circumstance I have no  
24 objection.

25 JUDGE LUTON: All right. Then the attachments are

1 received as attachments to Exhibit No. 5 which I believe has  
2 already been received.

3 MR. MILLER: Yes, it has, Your Honor. This was the  
4 only remaining --

5 MR. BERFIELD: Yeah. I believe it was received  
6 subject to submission of the attachments.

7 JUDGE LUTON: Okay. Then the condition is removed  
8 and what has previously been 5 along with now the -- these  
9 attachments will constitute EZ's Exhibit No. 5.

10 (The attachments to the document that  
11 was previously marked for  
12 identification as EZ Exhibit No. 5  
13 and received into evidence are now  
14 also received into evidence.)

15 MR. MILLER: Thank you, Your Honor.

16 MR. KRAUS: But, Your Honor, there's one other item.  
17 We offered -- I promised to give backup material relating to  
18 Mr. Box's statement about WKQB, both technical material and  
19 some, some profit and loss information relating to the prior  
20 licensee. I hope to have the engineering finished today and  
21 be able to exchange -- at least exchange that exhibit with Mr.  
22 Berfield and the Bureau tomorrow.

23 JUDGE LUTON: All right.

24 MR. BERFIELD: That's satisfactory, Your Honor,  
25 sure.

1 JUDGE LUTON: I saw something within the last couple  
2 of days which indicates the parties are still going to let me  
3 know about any public witnesses. When are they going to let  
4 me know about this?

5 MR. MILLER: Your Honor, we have decided not to call  
6 any of theirs, so we are not calling any of their principles.  
7 We are not calling any of their public witnesses.

8 JUDGE LUTON: All right.

9 MR. MILLER: My understanding is that our principles  
10 have been noticed and that counsel for Allegheny has reserved  
11 judgment on our community witnesses.

12 MR. BERFIELD: Your Honor, we start on Tuesday and I  
13 have asked that they present their General Manager first, Mr.  
14 Meyer, then the President, Mr. Box, and then Mr. Kellar and  
15 they've, I think, agreed to that --

16 MR. MILLER: That's right.

17 MR. BERFIELD: -- procedure. At the conclusion of  
18 that I'll let you know, if I may, next week at the conclusion  
19 of the hearing as to whether we need any public witnesses, if  
20 that's satisfactory. If not, we'll do it at a sooner date.  
21 I'd kind of hoped to reserve to see how the questioning went  
22 as to whether they were needed --

23 JUDGE LUTON: I understand.

24 MR. BERFIELD: -- quite frankly. I mean, under  
25 normal circumstances we wouldn't call them, but in view of

1 your ruling today I'd like to see how the hearing goes next  
2 week if I may.

3 JUDGE LUTON: All right. Let me know as soon as you  
4 can. If you can't let me know any sooner than the middle of  
5 next week, then it will be that way, but if you should be able  
6 to determine the need or no need for them before then, please  
7 let me know as soon as you --

8 MR. BERFIELD: I will. I will, Your Honor.

9 JUDGE LUTON: -- are able to decide.

10 MR. BERFIELD: Thank you for your consideration.

11 (Whereupon, the hearing was adjourned at 1:15 p.m.)  
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**CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER**

IN APPLICATIONS OF EZ COMMUNICATIONS, INC.

**Name** AND ALLEGHENY COMMUNICATIONS GROUP, INC.

MM DOCKET NO. 93-88

**Docket No.**

WASHINGTON, D.C.

**Place**

OCTOBER 19, 1993

**Date**

We, the undersigned, do hereby certify that the foregoing pages, numbers 139 through 151, inclusive, are the true, accurate and complete transcript prepared from the reporting by DAVID L. BECKER in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

October 27, 1993

**Date**

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October 28, 1993

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